

1 Spencer Kenner (SBN 148930)
James E. Mizell (SBN 232698)
DEPARTMENT OF WATER RESOURCES
2 Office of the Chief Counsel
1416 9th St., Room 1104
3 Sacramento, CA 95814
Telephone: 916-653-5966
4 E-mail: jmizell@water.ca.gov

5 Attorneys for California Department of Water
Resources
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7
8 **BEFORE THE**
9 **CALIFORNIA STATE WATER RESOURCES CONTROL BOARD**

10 **HEARING IN THE MATTER OF CALIFORNIA**
11 **DEPARTMENT OF WATER RESOURCES**
12 **AND UNITED STATES BUREAU OF**
13 **RECLAMATION REQUEST FOR A CHANGE**
IN POINT OF DIVERSION FOR CALIFORNIA
WATER FIX

DWR'S CONSOLIDATED RESPONSE
TO MOTIONS BASED UPON ITS
MARCH 28, 2018 LETTER

14 The CA Department of Water Resources (DWR) submits this response to motions
15 based upon its March 28, 2018 letter regarding public availability of a project optimization
16 fact sheet and details relevant to the water rights change petition hearing.^{1,2}

17 DWR asserts that the project optimizations reduce the impacts of the California
18 WaterFix upon fish and wildlife. A straightforward reading of the information contained in
19 its submission supports continuation of Part 2 without modification. Because a Part 2

20 ¹ DWR's consolidated response addresses LAND et al.'s and San Joaquin County et al.'s Motion to
21 Stay or Continue Hearing, CSPA et al.'s Motion to Stay or Continue WaterFix Part 2 Hearing,
22 Clifton Court, L.P.'s April 2, 2018 letter, Deirdre Des Jardins' Joinder in CSPA et al.'s Motion to
23 Stay or Continue the WaterFix Hearing, Save the California Delta Alliance, et al.'s Motion to
24 Require Petitioner to: 1) Amend the Petition to Reflect ACOE-required Changes; 2) Schedule Part 2
Rebuttal After Issuance of Supplemental Environmental Impact Report Addressing ACOD-required
Changes; and 3) Combine Delta Alliance's Case-in-chief with its Rebuttal Case for Presentation
During Rebuttal Phase, and North Delta CARES Action Committee's April 3, 2018 letter.

25 ² DWR objects to the late filings of PCFFA and IFR joining CSPA et al., LAND et al. and San
26 Joaquin County et al., Restore the Delta joining CSPA et al., LAND et al. and San Joaquin County et
27 al., Snug Harbor Resorts, LLC joining CSPA et al., LAND et al. and San Joaquin County et al.,
28 Contra Costa County et al. joining LAND et al. and San Joaquin County et al., and County of
Sacramento et al. joining LAND et al. and San Joaquin County et al. However, to the extent these
filings are merely joinders with timely submitted filings, this response addresses the points raised.
DWR reserves the right to respond to any new arguments raised by the late filings.

1 rebuttal testimony deadline has not been announced, the Hearing Officers can take the
2 project optimizations release into account in scheduling rebuttal testimony. Furthermore,
3 previous rulings state that there remains the option of revisiting specific portions of Part 1
4 should the Hearing Officers feel that unexplored impacts remain at the end of Part 2.

5 DWR also asserts that nothing submitted in the opposition filings alter the approach
6 to Part 3. If and when DWR makes a determination to more formally proceed with staged
7 construction, DWR will communicate this at its first opportunity and it is expected the
8 Hearing Officers would then announce if there is a need for a Part 3. That triggering event
9 has not occurred.

10 The arguments set forth by other parties fall into several categories that are
11 comprised of 1) reasserting claims over the oft-argued petition sufficiency; 2) challenging
12 aspects of CEQA compliance; 3) procedural arguments on timing of future aspects of this
13 hearing; 4) characterization of the April 2, 2018 Metropolitan Water District of Southern
14 California (Metropolitan) message from its General Manager, Mr. Kightlinger, to the Board
15 of Directors and Member Agency Managers; and 5) requests for an immediate
16 determination by the Hearing Officers as to what evidence should be the basis of a decision
17 on the Petition.

18 Additionally, DWR is responding to Mr. Derringer's question on March 29, 2018
19 regarding the degree to which DWR is bound by the project optimizations. This is found in
20 section 6 below.

21 DWR asserts the following in response to the categories of arguments. 1) Similar
22 arguments over the sufficiency of the petition have been ruled upon multiple times. 2)
23 multiple rulings state that CEQA challenges are not properly within the scope of this
24 hearing. 3) The public disclosure of project optimizations does not alter the
25 appropriateness of the current hearing process. 4) The Metropolitan communication is not,
26 nor does it assert to be, a decision by DWR or the Metropolitan Board on the matter of a
27 staged construction approach to the California WaterFix. Any decision based upon this
28 communication is premature. In addition, conflating this communication with the project

1 optimizations is inappropriate. 5) Any immediate determination by the Hearing Officers as
2 to what evidence should be the basis of a determination on this Petition is premature. And,
3 6) DWR cannot determine at this time which components of the project optimizations will be
4 reflected in permit terms and conditions from any of the regulatory processes that govern
5 this project.

6 **1. Claims over Petition Sufficiency Are Repetitive and Should Be Denied**

7 Parties reasserting claims over the oft-argued petition sufficiency are both repetitive,
8 a waste of judicial resources given their frequency, and a mischaracterization of the degree
9 of change contained in the project optimizations. These challenges are a mere
10 repackaging of motions and requests previously made.

11 The project optimizations are largely proposed to further avoid and minimize
12 potential environmental impacts of the California WaterFix and, as such, do not change the
13 Petition fundamentals of adding three points of diversion at the locations indicated in the
14 Petition, with no other changes requested in the permits.

15 The project optimizations do not change the modeling submitted for this Petition.

16 The project optimizations do not change the operational scenario described in
17 Petitioners' Part 2 testimony.

18 The supporting information submitted at the time of the previous rulings was found
19 sufficient and puts to rest these repetitive claims as to the sufficiency of the Petition. This
20 hearing was intended to produce additional information, and the Hearing Officers have
21 constructed a hearing process that can accommodate information developed in the course
22 of the case-in-chief. That is the purpose of allowing for rebuttal.

23 Nothing in the project optimizations alters the prior rulings or the process of the
24 hearing. All of the information contained in the project optimizations falls squarely within
25 the scope of Part 2 rebuttal as defined by the Hearing Officers.

26 **2. CEQA Challenges Are Not Properly Within the Scope of the Hearing**

27 Parties assert that the proposed supplemental environmental impact report does not
28 comply with CEQA. For instance, LAND et al. asserts that there is an absence of a Notice

1 of Preparation. This is outside the scope of this hearing and should be disregarded based
2 upon prior rulings of the Hearing Officers.

3 **3. Timing of Project Optimizations Do Not Alter the Hearing Process**

4 The timing of the release of project optimizations do not alter the hearing process.
5 The information was disclosed at a time when all parties have an opportunity to assess it
6 without prejudice as to the rebuttal component of Part 2. The information falls entirely
7 within what would be appropriate rebuttal topics for Part 2. There is an established process
8 by which parties can review, evaluate and respond to information disclosed within the
9 cases-in-chief and cross-examination. This process has the capacity to account for new
10 information that is responsive to Part 2 issues and cross-examination during the
11 development of rebuttal based upon the scope of rebuttal previously established by the
12 Hearing Officers. In a prior ruling the Hearing Officers have determined that rebuttal can
13 consist of both Part 2 issues as well as Part 1 issues raised in connection with information
14 that is responsive to Part 2 issues. There are no modifications to the hearing process
15 necessary to accommodate the concerns of the other Parties.

16 **4. It is Premature to Alter the Hearing Based Upon Metropolitan's**
17 **Communication**

18 Metropolitan's communication by its General Manager is not a decision by DWR. It
19 is premature to act upon this communication. Furthermore, Metropolitan's communication
20 is unrelated to the project optimizations announced by DWR. The California WaterFix
21 remains a two-tunnel three-intake 9,000cfs project. Assertions to the contrary are
22 speculative and not an appropriate basis to alter the Part 2 structure.

23 The Hearing Officers have previously discussed how a Part 3 would be announced
24 should DWR determine that it would pursue a staged construction approach to California
25 WaterFix.

26 **5. Requests for an Immediate Determination on What Evidence is Supportive of a**
27 **Future Decision is Premature**

28 Ms. Des Jardins states that the Hearing Officers should establish now the weight

1 they will give to specific witness testimony. This is premature. Dr. Earle's testimony,
2 DWR's maps, and Jeff Michaels' testimony are before the Hearing Officers and Ms. Des
3 Jardins' attempt to preclude the consideration of submitted evidence based upon
4 refinements that have not been entered into evidence nor explored through the hearing
5 process is unsupportable and speculative. The weight of evidence is appropriately
6 considered by the Hearing Officers at the conclusion of the hearing.

7 **6. Determination of the Binding Nature of the Project Optimization is Speculative**
8 **at this Time**

9 DWR understands that the Hearing Officers and the Hearing Officers' counsel is
10 looking to gage the permanence of the project optimizations. At this time there are no
11 permit terms or conditions that DWR can reference that would require incorporation of
12 these changes. There may be additional information DWR can provide on this issue as the
13 other permitting processes progress.

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15 DWR asserts that the project optimizations reduce the impacts of the California
16 WaterFix upon fish and wildlife. A straightforward reading of the information contained in
17 its submission supports continuation of Part 2 without modification. Because a Part 2
18 rebuttal testimony deadline has not been announced, the Hearing Officers can take the
19 project optimizations release into account in scheduling rebuttal testimony. Furthermore,
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24 construction, DWR will communicate this at its first opportunity and it is expected the
25 Hearing Officers would then announce if there is a need for a Part 3. That triggering event
26 has not occurred.

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1 Dated: April 4, 2018

CALIFORNIA DEPARTMENT OF WATER RESOURCES

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4 Tripp Mizell, Sr. Attorney

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